Filed 6/20/19 In re Christopher P. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CHRISTOPHER P., a Person Coming Under the Juvenile Court Law.	B289378 (Los Angeles County Super. Ct. No. KJ39294)
THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER P., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin L. Brown, Judge. Affirmed.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Paul M. Roadarmel, Jr., and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition alleging that Christopher P. (Christopher) committed attempted second degree robbery with a firearm. On appeal, Christopher contends that the juvenile court violated his due process rights by admitting an eyewitness identification made during a field showup. He also contends that his trial counsel was ineffective for failing to ask the court to strike the firearm enhancement under recent legislation. We reject both contentions and affirm the judgment.

BACKGROUND

The People filed a petition under Welfare and Institutions Code section 602 alleging that Christopher committed attempted second degree robbery (Pen. Code,[1] §§ 664, 211; count 1) with a firearm enhancement (§ 12022.53, subd. (b)). After denying Christopher's motion to suppress the victim's identification of him, the matter proceeded to a hearing on the petition.

At the hearing, the victim testified that, on December 16, 2017, he was browsing an online selling and buying application. When he saw a cell phone for sale, he messaged the seller. The victim and the seller agreed to meet in 45 minutes at a specified location in Covina, where the seller said he was located. When the victim arrived at the location at 2:25 p.m., he texted the seller, who responded that he was coming.

Shortly thereafter, two young men approached the victim. The victim described both as a "combination of Hispanic and African," 5 feet 7 to 8 inches tall, and in their early 20's or late

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[1] All further statutory references are to the Penal Code.

teens. One, whom the victim later identified at the field showup as Christopher, had a ponytail bun. The man with Christopher showed the victim a phone and told the victim to show the money. Christopher pointed a gun at the victim and "racked" it, while the other man pointed a pocketknife at the victim. The victim backed up toward some residents who had come outside. After quickly searching the victim's car, Christopher and his companion left.[2] The victim clearly saw Christopher's face.

The victim called the police. Later that night and after giving an admonition to the victim, an officer took him to a field showup where officers brought out two suspects, one at a time, including Christopher. The victim recognized them "right away" as the men he'd encountered earlier that day.

At the hearing on the petition, however, when asked if he saw either of the men who tried to rob him, the victim said he could not remember.

Based on this evidence, the juvenile court, on April 3, 2018, sustained the petition and the firearm enhancement. The court declared count 1 to be a felony and Christopher a ward of the court. The court ordered Christopher to be placed in a community camp program for five to seven months and set the maximum time of confinement at 13 years.[3]

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[2] Christopher lived just three minutes away on foot.

[3] The court did not specify what comprised the 13-year term, but the high term for attempted second degree robbery is three years (§ 213, subds. (a)(2), (b)) and the term for the firearm enhancement is 10 years (§ 12022.53, subd. (a)(4), (18)).

DISCUSSION

I. Admission of identification evidence

Christopher contends that admitting the identification evidence violated his due process rights. We disagree.

A. *Additional background*

Before the hearing on the petition, Christopher moved to exclude the victim's identification of him. Officer Tremell Reed testified at the hearing. According to Officer Reed, the victim arrived at the station at approximately 9:45 p.m. The officer told the victim that they had two possible suspects in custody and the victim was being asked to identify or to rule them out as being involved. Officer Reed did not describe the suspects or ask the victim to describe them. He instead told the victim: "The person is in temporary custody as a possible suspect only. The fact the person is in police custody is not an indication of guilt or innocence. The purpose of the field show-up is to either eliminate or identify the person as a suspect involved in the crime."[4] The victim seemed to understand the admonition.

Officer Reed drove the victim the three miles to the parking lot where the field showup was conducted. Four or more police vehicles and at least three police officers were there. While the victim remained in the back of a patrol car, two officers escorted a handcuffed Christopher out of another vehicle, with one officer holding Christopher's arm. Christopher was approximately 50 feet from the victim, and one officer was on either side of Christopher. A spotlight illuminated the area and the suspect.

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[4] Although the officer did not read the admonition at the hearing, he recited it at trial.

The victim identified Christopher as the person with a gun who tried to rob him, and he expressed no doubt about his identification at the time. The victim also identified the other suspect as Christopher's accomplice.

Based on this evidence, the juvenile court found that the identification procedure was not unduly suggestive and denied the motion to suppress the identification evidence.

B. *The field showup was not unduly suggestive or unreliable*

Lineups and showups are suggestive. (*People v. Medina* (1995) 11 Cal.4th 694, 753; *People v. Odom* (1980) 108 Cal.App.3d 100, 110.) Even so, the due process clause of the Fourteenth Amendment compels excluding identification evidence only when the procedure used to obtain it is *unduly* suggestive and unnecessary and unreliable. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *Medina*, at p. 753.) The test for constitutionality thus consists of two prongs: "(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*); *Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) If the first prong is not met, that is, the challenged procedure was not unduly suggestive, then our inquiry ends. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256.)

"A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*People v. Clark* (2016) 63 Cal.4th 522, 556–557.) The defendant bears the burden of showing an unreliable identification procedure. (*Cunningham*, *supra*, 25 Cal.4th at p. 989.)

We now turn to the first prong, whether the field showup was unduly suggestive. For a witness-identification procedure to violate due process, "the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.) Stated otherwise, the state must suggest in advance of identification by the witness the identity of the person the police suspect. (*Ibid.*)

Here, Christopher argues that the admonition Officer Reed gave to the victim did not offset the suggestive nature of the showup because the admonition was "not clear-cut." To support this characterization, Christopher refers to the victim's inability at trial to recall whether he was given an admonition. The victim's failure of recollection does not render the standard admonition Officer Reed said he gave to the victim "not clear cut." Rather, it clearly informed the victim that Christopher was "a possible suspect only" and that his custodial status was not indicative of guilt or innocence. The admonition thus tempered the suggestive nature of the identification procedure. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 699; *Cunningham*, *supra*, 25 Cal.4th at p. 990.) However, Christopher speculates that the admonition's efficacy was undermined by the victim's supposed

inability to understand it, as English was not the victim's first language. Nothing in the record supports that imputation. The victim did not testify through an interpreter. And, at trial, the victim was "pretty comfortable" speaking English. Indeed, the juvenile court observed when ruling on the petition that although it was evident English was not the victim's first language, he was "quite able" to understand and to express himself with precision.

Next, Christopher complains that the "numerous" patrol cars and officers at the field showup and that he was handcuffed between two officers rendered the procedure unduly suggestive. Not so. That a suspect is handcuffed does not render a procedure unduly suggestive. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.) Nor does the presence of officers render it unduly suggestive. (*In re Richard W.* (1979) 91 Cal.App.3d 960, 969–970; *People v. Craig* (1978) 86 Cal.App.3d 905, 914.) The mere number of patrol cars and officers does not change the nature of the showup; that is, even if only one officer was present, Christopher was just as readily identifiable as the possible suspect. Finally, that lights illuminated Christopher is understandable because the showup was at 9:45 p.m.

Given our finding that the field showup was not unduly suggestive, it is unnecessary to address at length the second prong of the inquiry, i.e., whether the identification was reliable under the totality of the circumstances. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1256.) It was reliable. The law encourages field identification procedures to occur in close proximity to the time and place of the crime so that the element of suggestiveness can be offset by the reliability of a prompt identification made while events are fresh in the witness's mind. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.) Christopher's field showup

occurred seven hours after the attempted robbery. This was sufficiently close to the crime. (See, e.g., *Garcia*, at p. 1359 [curbside showup six hours after robbery]; *People v. Rodriguez* (1987) 196 Cal.App.3d 1041 [field showups nine hours after crimes].)

Also, the crime occurred outside, during the day. The victim had a clear view of Christopher, who was a matter of feet from the victim. (See, e.g., *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1218.)

Even if the victim's description of the robbers was inaccurate in some respects, it was generally accurate and therefore reliable. (*In re Carlos M.*, *supra*, 220 Cal.App.3d at p. 387; *People v. Blair* (1979) 25 Cal.3d 640, 662.) The victim described Christopher as a combination of Hispanic and African; Christopher is Hispanic. The victim said the robbers were young, in their late teens or early twenties; Christopher was then 17 years old. The victim said the man with a gun had a ponytail bun; Christopher had a ponytail bun. Further supporting the identification's reliability was that the seller chose the meeting place, and Christopher lived only three minutes from where the crime occurred.

Finally, we reject the argument that the victim's inability to identify Christopher at trial undermined the reliability of the victim's prior identification. As the juvenile court observed, the victim had expressed anxiety at testifying with Christopher in the room and the victim therefore may have been afraid to identify Christopher at trial. Whatever the reason, the victim's failure of recollection underscores a reason why prompt field showups are permissible: they occur when events are fresh in the witness's mind, heightening the identification's reliability.

(*People v. Garcia*, *supra*, 244 Cal.App.4th at p. 1359; see *People v. Boyer* (2006) 38 Cal.4th 412, 480 [out-of-court identifications generally have greater probative value than in-court ones].)

We therefore conclude that admitting evidence of the field showup did not violate Christopher's due process rights.

II. Ineffective assistance of counsel

The juvenile court found the firearm enhancement under section 12022.53, subdivision (b) true and sentenced Christopher in April 2018. By that date, Senate Bill No. 620 had been in effect for three months, since January. Senate Bill No. 620 amended section 12022.53 to give trial courts authority to strike the enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Although the bill was in effect when the petition here was sustained, Christopher's trial counsel did not ask the court to strike the enhancement. Christopher now contends that his counsel therefore rendered ineffective assistance.

We disagree. To establish ineffective assistance of counsel, a defendant must show that trial counsel's representation fell below an objective standard of reasonableness *and* resulting prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216; *Strickland v. Washington* (1984) 466 U.S. 668, 690.) Even if we assumed error, Christopher cannot establish prejudice. That is, we presume a trial court knows the governing law (*People v. Braxton* (2004) 34 Cal.4th 798, 814) and properly exercised its discretion in sentencing (*People v. Weddington* (2016) 246 Cal.App.4th 468, 492; *People v. Reyes* (2016) 246 Cal.App.4th 62, 82). We therefore presume that the juvenile court considered and exercised its discretion in favor of not striking the enhancement. Therefore, no prejudice accrued to Christopher.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.